STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 4, 2013
v	No. 308357 Wayne Circuit Court
JEFFERY BRUCE PAYNE, Defendant-Appellant.	LC No. 11-006775-FC

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 15 to 30 years for the armed robbery conviction and two years for the felony-firearm conviction. We affirm.

Defendant first argues that he is entitled to a new trial because his convictions are against the great weight of the evidence. Defendant does not dispute any specific element of the crimes for which he was convicted. Rather, defendant claims that the trial court improperly weighed the testimony of the complainant, Melvin Johnson, in favor of the prosecution and that defendant's alibi witness, Tanya Anderson-Hoque ("Hoque"), was credible. Defendant's argument fails.

A new trial may be granted if a verdict is against the great weight of the evidence. *People v Brantley*, 296 Mich App 546, 553; 823 NW2d 290 (2012). The determination of whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon*, 456 Mich 625 (1998). A verdict is against the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). Appellate review of findings of fact is for clear error. *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012). A finding is clearly erroneous if the reviewing court is left with a "definite and firm conviction that an error occurred." *Id.* at 315-316.

Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). If the resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, this Court will defer to the trial court, which had a superior opportunity

to evaluate these matters. *People v Roberts*, 292 Mich App 492, 503-504; 808 NW2d 290 (2011). Absent exceptional circumstances, the issue of witness credibility should be left to the trier of fact. *Lemmon*, 456 Mich at 642-643. The exceptional circumstances recognized in *Lemmon* are: (1) the testimony contradicts indisputable physical facts or laws; (2) the testimony is patently incredible or defies physical realities; (3) the testimony is so inherently implausible that it could not be believed by a reasonable juror; or (4) the testimony has been seriously impeached and the case is marked by uncertainties and discrepancies. *Id*. at 643-644.

Defendant's convictions are not against the great weight of the evidence. Johnson left the liquor store with defendant and Cedric, who were waiting outside. Defendant pressed his arm on Johnson's shoulder and insisted that Johnson keep walking toward the alley. Once they were in the alley, defendant took a shotgun from a third, unknown perpetrator, and rested it on Johnson's chest after Cedric forced Johnson to the ground. Cedric took Johnson's glasses and wallet, as well as $83 that was in Johnson's pocket. Defendant and Cedric counted the money, walked away, and left through a field behind the liquor store. Johnson was confident that defendant was a perpetrator of the robbery because he knew defendant for roughly 15 years. Although the robbery occurred at 5:30 p.m. or 6:00 p.m., and in broad daylight, despite that it was in the heart of summer, considering the whole body of proofs, we agree with the trial court that the underestimation of the time that the robbery occurred deserves little weight. In addition, Johnson's inconsistent testimony regarding the amount of time he waited for the police at the liquor store after the robbery occurred is not enough for this Court to interfere with the trial court's verdict.

Despite defendant's arguments that the conflicting testimony of Johnson and Hoque entitles him to a new trial, conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. *Unger*, 278 Mich App at 232. Moreover, this case does not involve any exceptional circumstances as recognized in *Lemmon* that would justify this Court disturbing the trial court's findings. See *Lemmon*, 456 Mich at 643-644. Therefore, defendant is not entitled to a new trial because the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to stand.

Defendant next argues that he is entitled to a new trial because the trial court abused its discretion in denying his motion for a new trial based on newly discovered evidence.

A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions. *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). Questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error. *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010).

Defendant argues that the trial court abused its discretion in finding that, even if the evidence was newly discovered, not cumulative, and defendant could not have produced the witnesses at trial using reasonable diligence, the testimony of Nathan Parks and Tonya Trowell as additional alibi witnesses would not have caused a different result on retrial. We disagree with defendant's claim.

Motions for new trial on the ground of newly discovered evidence are looked upon with disfavor. *Rao*, 491 Mich at 279-280. To grant a new trial on the basis of newly discovered evidence, the defendant must satisfy the four-part test articulated in *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003). A defendant must show (1) the evidence itself, not merely its materiality, is newly discovered; (2) the newly discovered evidence is not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. *Rao*, 491 Mich at 279.

Evidence is not newly discovered if the defendant or defense counsel was aware of it at the time of the trial. *Id.* at 281. "When evidence is known to the defendant at the time of trial, but is claimed to have been unavailable, the third part of the *Cress* test is necessarily implicated because it requires a showing that the defendant could not, using reasonable diligence, have discovered and produced the evidence at trial." *Id*. at 283 (citation omitted). What constitutes reasonable diligence in producing evidence at trial depends on the circumstances. *Id*. at 283-284. When evidence is claimed to be unavailable because a witness cannot be found, reasonable diligence may include a continuance or postponement. *Id*. at 284.

The trial court did not specifically address whether defendant satisfied the first three parts of the *Cress* test. However, the trial court did not abuse its discretion in finding that defendant failed to show the fourth factor of the *Cress* test, i.e., that the testimony of Parks and Trowell would make a different result probable on retrial. Defendant presented their testimony to corroborate Hoque's testimony that defendant was downtown at the time of the robbery. Trowell and Parks went downtown between 6:00 p.m. and 7:00 p.m. on June 26, 2011. Although Parks and Trowell testified that they had a 10 minute conversation with defendant and Hoque, neither testified regarding the time they saw defendant on June 26, 2011. Specifically, Trowell did not remember the time that she saw defendant, but said it was light outside. Likewise, Parks thought he saw defendant at 3:00 p.m. or 4:00 p.m., but stated that it may have been later because he did not leave church until 3:00 p.m. Even if Parks thought he saw defendant later than 3:00 p.m., it is fair to infer that defendant could still have committed the robbery at 5:30 p.m. or 6:00 p.m., as Johnson testified. Moreover, Johnson knew defendant for 15 years, and the trial court found that this was not a case where Johnson had trouble identifying the robber. Therefore, defendant failed to show that the trial court abused its discretion in denying defendant's motion for a new trial based on the discovery of the testimony of Parks and Trowell.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Patrick M. Meter